

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF GROUND WATER)
APPLICATION NOS. G3-21947,)
G3-20486, G3-20818, G3-11743)
AND G3-20700)

FRANK P. SHINN, JR. and)
HARRY MASTO,)

Appellants,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY, NINA)
NETTIE JASMANN, BARNEY)
GETZINGER, JOHN E. CALBOM,)
HENRY CURTIS VINCENT III and)
DICK HINKHOUSE FOR THE ESTATE)
OF FRANK HINKHOUSE,)

Respondents.)

PCHB Nos. 648, 648-A, 649, 650,
651 and 652

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Formal hearings (which were originally set to be heard seriatum)
on the above-numbered appeals came on regularly before Board member
W. A. Gissberg in Spokane, Washington on November 12, 1974.

In each of the appeals: the sole appellant is either Frank P. Shinn,

1 Jr. or Harry Masto, both of whom appeared by and through their attorney,
2 John Moberg; the Department of Ecology is in each case one of the
3 respondents and it appeared by and through Wick Dufford, Assistant Attorney
4 General.

5 One other respondent is involved in each of the appeals and was
6 represented at the hearings in the following manner:

7	<u>PCHB No.</u>	<u>Respondent</u>	<u>Appearance by</u>
8	648, 648-A	Nina N. Jasmann	Lawrence L. Tracy, Attorney
9	649	Barney Getzinger	pro se
10	650	John E. Calbor	did not appear
11	651	Henry C. Vincent III	did not appear
12	652	Estate of Frank Hinkhouse	did not appear

13
14 The Board had previously heard and taken extensive testimony in the
15 appeal of PCHB Cause No. 613. In that case the issues of fact and law
16 are essentially the same as in these cases now before the Board.
17 Accordingly, at the outset of the instant hearings, the appellants and
18 the respondents, Jasmann, Getzinger and the Department of Ecology
19 stipulated to the entry of a procedural order by the presiding officer
20 which would:

- 21 1. Incorporate as a part of the record of the instant appeals,
22 the transcript of the evidence and the exhibits adduced at
23 and during the hearing on the appeal of PCHB 613.
- 24 2. Consolidate all of the instant appeals for hearing.

25 The presiding officer at the hearing orally entered such an order
26 and, in so doing, took into account the statements of attorneys Moberg
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1 and/or Tracy that respondents Calbom and Vincent had no objections
2 thereto. The Board confirms that order.

3 Having thus considered the transcript of the testimony and the
4 exhibits presented by the parties during the hearing of the instant
5 appeals and the transcript of the testimony and the exhibits adduced
6 during the hearing of PCHB 613, the contentions of the parties and their
7 post hearing briefs, the exceptions and reply thereto, and being in all
8 matters fully advised, this Board makes and enters the following

9 FINDINGS OF FACT

10 I.

11 Under the geographical area involved in this matter there are
12 prehistoric layers of permeable basalt rock to a depth of at least
13 4,500 feet formed by successive lava flows. The layers form pockets in
14 which ground water aquifers have formed. In 1943, with the construction
15 of Grand Coulee Dam, the Columbia Basin Project was formed to develop an
16 irrigation system for agricultural development.

17 The Columbia Basin Project never has provided irrigation canal
18 water to the geographical area involved in this matter. The easternmost
19 canal of the project, the East Low Canal, lies to the west of the instant
20 geographical area.

21 II.

22 The instant geographical area historically was known as one where
23 dry land farming was practiced. But in the early 1960s, probably as a
24 result of comingling of irrigation water seepage from areas to the
25 west with natural water aquifers, the instant geographical area
26 experienced a rise in its water table.

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1 Farmers found it financially feasible to drill for water and, thus,
2 increase their crop yields by sprinkler irrigation. Respondent's
3 predecessor agency issued 150 ground water well permits for irrigation
4 and, by 1966, it was obvious, from a declining water table, that there
5 could be an overissue of water withdrawal permits.

6 III.

7 In response to the above-described situation, the Department
8 promulgated WAC 508-14-010 and -020 on May 15, 1967. These regulations
9 established certain management areas and interim rules under which
10 ground water applications would be banned, limited or granted pending a
11 study by the Department of the source, extent, depth, volume and flow of
12 the ground waters.

13 In 1968, pursuant to the above, the Department closed an area
14 (called the "Odessa Fold Area") of about 1,100 square miles lying east
15 of the East Low Canal and including the instant geographical area to the
16 granting of ground water withdrawals. The Department agreed to accept
17 applications on a priority time basis but announced it would not process
18 them until completion of the aforementioned study.

19 IV.

20 To provide a foundation for the Department's water management program,
21 detailed studies were initiated by it to investigate water measurement
22 techniques, reasonable pump lifts, and to develop a functional ground water
23 model.

24 One part of the study, calculated to measure the level of water in
25 the aquifer and hence the availability of water for appropriation,
26 resulted in the completion in 1971 (by the United States Geological Sur y)

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1 of a mathematical model for the Odessa and other areas of the Columbia
2 Basin. The model enables a computer to produce ground water flow and
3 aquifer water level information when water is subtracted by pumping or
4 added by recharge. Its results have been field measured and its accuracy
5 verified for the Odessa Sub-Area related to the instant appeals as late as
6 January and February, 1973. The model was based on the accumulation of
7 water data over four years ending in 1970.

8 Another phase of its study, was directed at gathering information
9 relating to the restraints of RCW 90.44.070, and was undertaken by the
10 State of Washington Water Research Center, the results of which were
11 embodied in October, 1971 in respondents' Exhibit 20 entitled "Long-Run
12 Costs and Policy Implications of Adjusting to a Declining Water Supply in
3 Eastern Washington". The purpose of the study was to develop economic and
14 cost data in order that the Department could determine a "reasonable or
15 feasible pumping lift in case of pumping developments" (RCW 90.44.070).

16 As the result of the completion of such studies and based thereon
17 the Department adopted WAC 173-128 (establishing the Odessa Ground-Water
18 Management Sub-Area) on January 15, 1973 and WAC 173-130 (Odessa Ground-
19 Water Sub-Area Management Policy) on January 25, 1974, both of which
20 cover the geographical area of the instant appeals, and began to process
21 on a time priority basis, as filed, those ground water applications it
22 had been holding since 1968.

23 V.

24 The policy of the Department provides for a limited controlled rate
25 of decline of the water level in "Zone A", (which is the area of the
26 instant appeals) to a total amount of 30 feet in three years

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1 (WAC 173-130-060) and to prevent the water table from descending more to
2 300 feet beneath the altitude of the static water level, as measured in
3 1967. (WAC 173-130-070) In 1967 the altitude of the static water level
4 was 400 feet. Thus, by the granting of additional water rights, and the
5 appropriation thereof, the water level (as that term is used in
6 WAC 173-130-030(4) will ultimately be allowed by the Department to decline
7 to 700 feet below the earth's surface. Appellants are prior water
8 appropriators and, as a result of the issuance of new permits to others,
9 will ultimately be required to expend substantial sums of money for well
10 and well appurtenance improvements and additional operating costs to
11 enable them to appropriate the amounts of water to which they have a prior
12 right. However, the Department's regulations prevent junior appropriators
13 (respondents) from withdrawing ground water levels below 700 feet. Based
14 upon respondents' Exhibit 20 and the testimony of Doctor Walter R. Lucher
15 we find that allowing the water table to decline to 700 feet, at the
16 maximum rate of controlled decline of 30 feet in three years will not
17 result in an unreasonable pumping lift for the appellants.

18 As new permits are issued under such state policy, the waters which
19 have been stored in the aquifers will be depleted within 35 years, but
20 waters will at all times seep into the aquifer to provide a sustained
21 yield of water for the foreseeable future.

22 VI.

23 The cost study received by respondents' Exhibit 20 was based upon
24 price-market data of a five year time period ending in 1971. Since then
25 both the prices which the farmer pays and at which he sells his product
26 have increased. Since the prices at which a farmer sells his product

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1 is still valid and it constitutes the latest presently available
2 information on that subject.

3 VII.

4 Any new well which is developed and operating within three miles of
5 another existing well will have a drawdown effect on the water table of
6 the existing well and vice versa.

7 VIII.

8 Appellant Shinn, a well driller and irrigation systems specialist
9 with 26 years of experience in the Moses Lake area, owns 500 acres of
10 farm land serviced by three ground water wells upon which he has rights
11 prior in time to all respondents.

12 Appellant Masto, owns 1,440 acres of crop farm land serviced by
13 six ground water wells upon which he has rights prior in time to all
14 respondents. In 1974, during the height of the crop irrigation season,
15 all of his wells experienced a steadily declining amount of water
16 production and one of his wells went dry. A similar experience occurred in
17 1973. The cause of the lowering of water production was the declining
18 water table level which has occurred in the area.

19 IX.

20 The Department granted respondents' respective applications for
21 wells since they were found by the Department to have water available for
22 a beneficial use and that they would not impair existing rights or be
23 detrimental to public welfare. Appellants contend the new wells of
24 respondents will adversely effect those of appellants by lowering the
25 pumping level to an unreasonable level.

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X.

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2 Appellants were unable to prove that the proposed wells of respondents
3 Getzinger or Pinkhouse would effect the water pumping level of the wells of
4 either appellant. Appellants did establish that each of the proposed wells
5 of respondents, Jasmann, Calbon and Vincent, would contribute to the
6 continued lowering of the present water pumping levels of appellants'
7 wells, but to a degree not known. At any event, the amount of water with-
8 drawal contemplated by the combined permits of respondents (approximately
9 50,000 gallons per minute) will be within the water table decline permitted
10 by the provisions of WAC 173-130. The cumulative effect of respondents'
11 wells will be to reduce the static water level of appellants' wells.

XI.

12
13 The only evidence of the economic reasonableness of the pumping lift
14 which will be generally required as a result of the implementation of
15 respondent's policy and regulations is contained in respondents'
16 Exhibit 20. However, as that exhibit relates, "what is 'feasible' or
17 'economic' or 'reasonable' to one water user may not apply at all in
18 another case." (page 102 of respondents' Exhibit 20)

19 Appellants failed to establish that the pumping lift, as to them,
20 would be unreasonable or not feasible.

XII.

21
22 Any Conclusion of Law hereinafter stated which is deemed to be a
23 Finding of Fact is adopted herewith as same.

24 From these Findings the Pollution Control Hearings Board comes
25 to these

26
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1 CONCLUSIONS OF LAW

2 I.

3 Appellants do not question that the water permits issued to
4 respondents are for a beneficial use. Rather, appellants attack the
5 issuance of permits to respondents on the ground that such appropriation
6 of water would impair existing rights or be detrimental to the public
7 welfare (see RCW 90.44.060 which governs ground water but adopts
8 provisions of 90.03.290 relating to surface waters).

9 II.

10 It is true that appellants' rights, whatever they may be, precede
11 those of respondents'. Thus, the relevant question is whether appellants'
12 existing certificated water rights will be impaired by the regulations of
13 the Department, i.e., WAC 173-130, and the issuance of permits to
14 respondents pursuant thereto, the effect of which will be to lower the
15 pumping level of appellants' wells.

16 We conclude that the existing rights of appellants will not be
17 impaired.

18 III.

19 None of the permits of respondents, individually or collectively,
20 nor WAC 173-130 violate RCW 90.44.070 which provides:

21 No permit shall be granted for the development or withdrawal
22 of public ground waters beyond the capacity of the underground
23 bed or formation in a given basin, district, or locality to
24 yield such water within a reasonable or feasible pumping lift
25 in case of pumping developments

26 We conclude that the Department's limited and controlled rate of
27 water level decline, as expressed in its rule and regulation, provides
28 generally for a reasonable or feasible pumping lift. We recognize that

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1 economics must be given weight in construing the meaning to be given
2 to the statutory terms "reasonable", or "feasible." However, we have
3 found as a fact in Finding of Fact XI that appellants did not prove
4 facts which, as to them, might have established economic unreasonableness.
5 Ever had they done so, we would nonetheless conclude that RCW 90.44.060
6 must be interpreted as a prohibition only when the pumping lift becomes
7 unreasonable or not feasible as to "pumping developments" generally.

8 With the world-wide shortage of food and the specter of hunger
9 becoming evermore acute, the public interest demands that underground
10 waters be utilized (and thus not wasted) in order to convert arid lands
11 into the production of food. That would result in a small step in the
12 fulfillment of Isaiah 35.1. *The desert shall rejoice and blossom as the*
13 *rose.*

14 Assuming but not concluding, that appellants have a property right
15 in the level of the water table, their remedy may be to seek damages
16 against the State of Washington.

17 IV.

18 The permits issued by respondent are consistent, and not in conflict,
19 with RCW 90.44.060, 90.44.070 and 90.44.130. Therefore the permits of
20 respondents should be upheld.

21 V.

22 Any Finding of Fact which should be deemed a Conclusion of Law is
23 hereby adopted as such.

24 Therefore, the Pollution Control Hearings Board issues this

25 ORDER

26 The action and findings of the Department and its issuance of the

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1 permits to respondents are affirmed.

2 DONE at Lacey, Washington this 29th day of January, 1975.

3 POLLUTION CONTROL HEARINGS BOARD

4 *Chris Smith*
5 CHRIS SMITH, Chairman

6 *W. A. Gissberg*
7 W. A. GISSBERG, Member

8 *Walt Woodward*
9 WALT WOODWARD, Member

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CERTIFICATION OF MAILING

I, Dolores Osland, certify that I deposited in the United States mail, copies of the foregoing document on the 29th day of January, 1975, to each of the following-named parties, at the last known post office addresses, with the proper postage affixed to the respective envelopes:

Mr. John Moberg
Moberg and Moberg
P. O. Box "L"
Moses Lake, Washington 98837

Mr. Lawrence E. Tracy
Attorney at Law
P. O. Drawer 610
Moses Lake, Washington 98837

Mr. Wick Dufford
Assistant Attorney General
Department of Ecology
St. Martin's College
Olympia, Washington 98504

Mr. Barney Getzinger
Route 2, Box 107
Moses Lake, Washington 98837

Mr. Frank P. Shinn, Jr.
710 East Broadway
Moses Lake, Washington 98837

Mr. Harry Masto
P. O. Drawer 820
Moses Lake, Washington 98837

Ms. Nina N. Jasmann
2127 Iris Court
Santa Rosa, California 95404

Mr. John E. Calbom
Attorney at Law
P. O. Drawer 670
Moses Lake, Washington 98837

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